Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1119

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,
Appellants,

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

GENERAL CORPORATION, FIRST AMENDMENT FOUNDATION, INC., and CINEMA THEATRE OF HUNTSVILLE, INC.,

Plaintiffs

v.

EUGENE SWEETON, CHARLES H. YOUNGER, JOHN D. SNODGRASS, and CITY OF HUNTSVILLE,

Defendants

MTM, INC., an Alabama corporation; and MOBILE BOOKMART, INC., an Alabama corporation,

Plaintiffs

Civil Action No. 73-194-NE

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

Civil Action No. 73-427-S

Before RIVES, Circuit Judge, and McFADDEN and POINTER, District Judges.

POINTER, District Judge:

Positing jurisdiction under 28 U.S.C. §§ 1343(3) and 2201, plaintiffs filed these actions under 42 U.S.C. § 1983, seeking injunctive and declaratory relief from state court orders, entered pursuant to Alabama nuisance statutes, Alabama Code, Title 7, §§ 1091-1108[1], enjoining the operation of several theatres and book stores. These two cases were consolidated pursuant to Rule 42, F.R.C.P. A three-judge court was constituted to hear the consolidated cases, which are now submitted for decision on the merits and on motions to dismiss.

At the outset this Court must determine the propriety of federal intervention in state court proceedings in these cases. Principles of equity, comity and federalism dictate that state court proceedings remain free from federal court intervention, except in cases where plaintiff can show the existence of "special equities" that justify intervention.[2] *Younger v.*

[1] These statutes were designed to deal with places of "lewdness, assignation, or prostitution." Defendants herein have used these statutes to deal with places where obscene material is allegedly shown or distributed.

[2] We decline to await the Supreme Court's decision on the appeal from *Pursue Ltd. v. Huffman*, _____F.2d_____ (W.D. Ohio 1973, C72-432, Apr. 20, 1973). The *Younger* problem was not dealt with by the District Court in that case, presumably due to the lack of identicality of parties in the state and federal cases. Nor do we consider the Supreme Court's summary remands on June 25, 1973, of a number of cases, including *Grove Press, Inc. v. Bailey*, 318 F. Supp. 244 (N.D. Ala. 1970) and *Spivak v. Shriver*, 315 F. Supp. 695 (M.D. Tenn. 1970), for "further consideration in light of *Miller v. California* _____ U.S. _____ (1973)" etc., without mentioning *Younger*, as overruling *Younger*.

Harris, 401 U.S. 37 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971). The *Younger* case and its progeny can be considered as merely restating traditional principles applicable to both civil and criminal cases. 401 U.S. at 43-45; *Lynch v. Snepp*, 472 F.2d 769 (C.A.4, 1973). The Fifth Circuit has not yet been squarely faced with the question of whether or not *Younger applies to purely civil proceedings; however, it has found Younger* applicable to matters which, though labelled civil, have significant implications for a state's enforcement of its criminal laws. *Duke v. Texas*, No. 71-2845 (C.A.5, April 20, 1973); *Palaio v. McAuliffe*, 466 F.2d 1230 (C.A.5, 1972). See *American Radio Ass'n v. Mobile Steamship Ass'n*, _____F.2d_____ (C.A.5, No. 72-3803; August 22, 1973). *Cf. Hobbs. v. Thompson*, 448 F.2d 456 (C.A.5, 1971). Other circuits have indicated that *Younger* does apply to civil matters. *Cousins v. Wigoda*, 463 F.2d 603 (C.A.7, 1972), *application for stay denied* 409 U.S. 1201 (Rehnquist, Circuit Justice); *Lynch v. Snepp, supra*. We need not now reach this question, since we conclude that the state proceedings here in question complement, or serve as a substitute for, the criminal laws of the state.[3]

What then does *Younger require? As stated by the* Supreme Court in the more recent case of *Mitchum v. Foster*, 407 U.S. 225, 230 (1972):

> In *Younger*, this Court emphatically reaffirmed "the fundamental policy against federal interference

[3] Compare the situation in *80 Drive-in v. Baxley*, 468 F.2d 611 (C.A.5, 1972), wherein the Fifth Circuit had before it a matter which it indicated was purely civil in nature. That matter involved Alabama's general nuisance statutes, Alabama Code, Title 7, Article 1 of Chapter 31, whereas we are now faced with an application of Article 2 of Chapter 31, dealing with places of lewdness, assignation and prostitution as public nuisances. Note that § 1107 of Article 2 requires certain state officials to institute nuisance proceedings where nuisance has been established in a criminal proceeding, a criminal verdict of guilty being conclusive in the civil action. *See also, Ridge v. State*, 206 Ala. 349, 89 So. 742 (1921).

with state criminal prosecutions." 401 U.S., at 46. It made clear that even "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." 401 U.S., at 54. At the same time, however, the Court clearly left room for federal injunctive intervention in a pending state court prosecution in certain exceptional circumstances – where irreparable injury is "both great and immediate," 401 U.S., at 46, where the state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S., at 53, or where there is a showing of "bad faith, harrassment, or . . .other unusual circumstances that would call for equitable relief." 401 U.S., at 54.

In the present cases the plaintiffs have failed to demonstrate that the state court actions have been instituted in bad faith or to harrass. Compare *Cameron v. Johnston*, 390 U.S. 611 (1968) with *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Plaintiffs are not being threatened with multiple prosecutions – indeed, the essence of their complaint here is that they are not. *Cf. Younger v. Harris*, 401 U.S. at 47 ("the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution").

There is an insufficient showing that plaintiffs will suffer irreparable injury if consigned to their state court remedies. In Alabama permanent injunctions are appealable, and temporary injunctions may be made appealable by appropriate motions, and both types of appeals are given expedited, preferential treatment by statute.[4]

[4] See Alabama Code, Title 7, §§ 757, 1057 (Recomp. 1958). The plaintiffs in the federal court cases have had, have, or can have viable appellate rights (though it appears that at least two of the plaintiffs have elected to let the time for appeal expire).

There is a question as to whether the Alabama nuisance statutes here in question are "'flagrantly and patently violative of express constitutional prohibitions.'" *Mitchum v. Foster, supra.* However, it is quite possible that the Alabama Supreme Court might construe these statutes as inapplicable to motion picture theatres and book stores, obviating any federal constitutional question.[5] If a constitutional question remains after the statutes have been authoritatively construed, such question can be decided by the Alabama Supreme Court upon the same appeal.

On balance, we conclude that the plaintiffs have failed to show any of the exeptional circumstances required by *Younger* and that accordingly it is the duty of this Court to dismiss these cases.[6] Dismissal is, of course, without prejudice to any rights plaintiffs may have in the Alabama courts; and we intimate no opinion as to the merits of these cases.

[5] Note that the Georgia statute involved in *Speight v. Slaton*, 356 F.Supp. 1101 (N.D.Ga. 1973), on appeal to the Supreme Court as #72-1557, is specifically directed at obscenity and, unlike the Alabama statute, calls for destruction of the materials, even those which would be held not obscene. In *Speight* the state admitted that not all the materials sought to be seized were legally obscene; in the present case the posture of governmental officials apparently is that each and every film or book is legally obscene. Moreover, in *Speight* there was apparently "no way to construe abatement of a public nuisance to avoid the [claimed] constitutional infirmity" and the Georgia Supreme Court "may have already approved of the use of the public nuisance approach to closing down activities involving 'obscene' materials." (Judge Morgan dissenting in *Speight*, 356 F.Supp. at 1107, 1108.) We have not been advised of any like approval by the Alabama Supreme Court. Due to the differences in the cases it is doubtful that a reversal by the Supreme Court in *Speight* would be controlling on the cases here.

[6] We note our conclusion that these cases require the action of a three-judge court, 28 U.S.C. §§ 2281, 2284, even where the only action taken is dismissal for reasons of guilty, comity and federalism.

For the foregoing reasons, it is ORDERED, ADJUDGED and DECREED that the above-styled cases be, and the same hereby are, dismissed, each party to bear his own costs.

DONE, this the 18th day of October, 1973.

/s/Richard T. Riva
United States Circuit Judge

/s/Sam C. Pointer, Jr.
United States District Judge

/s/Frank McFadden
United States District Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,

Plaintiffs

v.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

Civil Action No. 73-427-S

NOTICE OF APPEAL

Now come the Plaintiffs, MTM, Inc., an Alabama Corporation, and Mobile Bookmart, Inc., an Alabama Corporation, in the above-styled cause, and gives notice of appeal from the judgment and order of the Honorable Richard T. Rives, District Judge, the Honorable Frank H. McFadden, District Judge, and the Honorable Sam C. Pointer, Jr., District Judge, rendered the 18th day of October, 1973, to the United States Supreme Court.

ROBERT EUGENE SMITH and
FERRIS S. RITCHEY, JR.

ERRATA SHEET

MTM, Inc. and Mobil Bookmart, Inc.

v.

Wm. J. BAXLEY, et al.

Appendix and Jurisdictional Statement

Photograph of Original Document Below

(Exhibit B, Pages A7 and A8.)

Dates were inadvertently omitted from these Pages.

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U.S. COURT OF APPEALS
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NEW ORLEANS, LA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MTM, INC., an Alabama Corporation; and MOBILE BOOKMART, INC., an Alabama Corporation,

Plaintiffs

vs.

WILLIAM J. BAXLEY, in his capacity as Attorney General for the State of Alabama; EARL C. MORGAN, in his capacity as Prosecuting Attorney for the Tenth Judicial Circuit of the State of Alabama; and HERBERT JENKINS, JR., in his capacity as Assistant City Attorney for Birmingham, Alabama,

Defendants

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
NOV 9 1973
WILLIAM E. DAVIS
CLERK U.S. DISTRICT COURT

CIVIL ACTION

NO. 73-427-S

NOTICE OF APPEAL

Now come the Plaintiffs, MTM, Inc., an Alabama Corporation, and Mobile Bookmart, Inc., an Alabama Corporation, in the above-styled cause, and gives notice of appeal from the judgment and order of the Honorable Richard T. Rives, District Judge, the Honorable Frank H. McFaddon, District Judge, and the Honorable Sam C. Pointer, Jr., District Judge, rendered the 18th day of October, 1973, to the United States Supreme Court.

ROBERT EUGENE SMITH and
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BY: _____
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A True Copy
ATTEST: WILLIAM E. DAVIS, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
By: _____
Deputy Clerk

(205) 595-6191

APPENDIX "B"

By: /s/ Ferris S. Ritchey, Jr.
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APPENDIX "C"

FIRST, FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, Alabama Code, Title 7, Sec. 5. 1091-1108

FIRST AMENDMENT, CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 374(1). **Title of chapter.** – This chapter shall be known as the Alabama Law on (Obscenity and may be referred to by that designation. 1961. p. 1310. § 1 signed Sept. 8, 1961.)

§ 374(2). **Purpose of chapter.** – The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this state. The elimination of this evil and the consequent protection of the citizens and residents of this state against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this state. (1961, p. 1310, § 2, appvd. Sept. 8, 1961.)

§ 374(3). **Definitions.** – The following words, terms and phrases used in this chapter shall, for the purpose of this chapter, have the meaning respectively ascribed to them in this section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States, or (b) any other printed or written matter or material which has not been determined to be nonmailable under thy laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious, scientific or educational institution. (1961, p. 1310, § 3, appvd. Sept. 8, 1961.)

§ 374(4). **Importation, sale or possession of obscene printed or written matter; penalties.** – (1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute or to give away or offer to give away, any obscene printed or writter matter or material, *other than mailable matter*, or any mailable matter known by such person to have been judicially found to be obscene under this charter, shall be guilty of a misdemeanor and, upon

conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, and sentenced to hard labor for the county, for not more than six months, and may be fined not more than five hundred dollars for each offense, or be imprisoned and fined in the discretion of the court. (1961, p. 1311, § 2 appvd. Sept. 8, 1961.)

§374(5). Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed. – Whenever the solicitor in any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution, or is (2) in this state, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the solicitor for the judicial circuit or county into which such mailable matter is sent or caused to be sent, brought or caused to be brought or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action in equity in the circuit court or any court having equity jurisdiction of the affected county for an adjudication of the obscenity of the mailable matter (1961), p. 1311, §5, appvd. Sept. 8, 1961.)

§ 374(6). **Same; complaint.** – The action authorized by section 374(5) shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description; (b) allege its obscene nature; (c) designate as respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away or processing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; (d) pray for an adjudication that it is obscene; (e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale commercial distribution, or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away, and (f) pray for its surrender, seizure and destruction. (1961, p. 1312, § 6 appvd. Sept. 8, 1961.)

§ 374(7). **Same; dismissal; temporary injunction; order to show cause; service of process.** – Upon filing of the complaint, described in section 374(6), the solicitor or register of the court shall present the same, including the exhibit thereto, as soon as practicable to the court for the examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to

show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial office as shown therein. Service of such order may be made in any manner provided by law and in case of mailable matter published or edited outside the state of Alabama and of any nonresident respondent, by registered or certified mail directed to the mailable matter or the respondent to be deemed to be prima facie evidence of service of such order upon the mailable matter or any respondent for the purposes of this section. (1961, p. 1312, § 7, appvd. Sept. 8, 1961.)

§ 374(8). **Same; appearance, answer and trial date; order on default.** – (1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may appear and file defensive pleadings.

(2) The court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other respondents, the court shall set a date for the trial of the case. (1961, p. 1313, § 8, appvd. Sept. 8, 1961.)

§ 374(9). **Same; speedy trials; rules of procedure.** – The public interest requires that all actions prescribed by this chapter, other than criminal actions under section 374(4), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements,

including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the court finds the same to be in the public interest. (1961, p. 1313, § 9, appvd. Sept. 8, 1961.)

§ 374(10). **Same; decree; enforcement.** – In the event the court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof.

(a) enter a permanent injunction against any respondent, prohibiting him from doing or continuing to do any thing condemned by this chapter;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable.

(c) direct all sheriffs in the state to seize and destroy all such obscene mailable matter in the possession or under the control of any respondent who shall fail to comply with the court's order.

(d) enter any other and appropriate orders to effectuate the decree or injunction (1961, p. 1313, § 10 appvd. Sept. 8, 1961.

§ 374(11). **Same; contents and effect of objections; service of copies of orders.** – Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms and describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all respondents named in the complaint and in the manner as provided in section 374(7) of this chapter. (1961, p. 1314, § 11, appvd. Sept. 8, 1961.

§ 374(12). **Importation, sale or possession of mailable matter found obscene.** – Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this state for sale or commercial distribution, or which in this state is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of section 374(4) of this chapter. (1961, p. 1314, § 12, appvd. Sept. 8, 1961.)

§ 374(13).**Violation of injunction.** – Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to sections 374(10) and 374(11) of this chapter, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court. (1961, p. 1314, § 13, appvd. Sept. 8, 1961.)

§ 374(14).**Extradition of person in another state charged with continuing violation.** – In all cases in which a court has entered its decree pursuant to section 374(10) that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a respondent to such decree, who cannot be found in this state, the governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found

pursuant to the laws of this state. (1961, p. 1315, § 14, appvd. Sept. 8, 1961.)

§ 374(15). **Presumption from possession of obscene matter; burden of proof.**– The possession of any three of the things enumerated in section 374(4) of this chapter (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. (1961, p. 1315, § 15, appvd. Sept. 8, 1961.)

§ 374(16). **Nonresidents and others importing obscene matter submit to jurisdiction of courts.** – In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside of this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons, including non-residents, who are responsible for the importation of such matter into this state and, by such act, submit themselves to the jurisdiction of the court of this state and any action authorized by section 374(5) of this chapter. (1961, p. 1315, § 16, appvd. Sept. 8, 1961.)

§ 1091. **(9280)** Definitions.–For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose. (1919, p. 52.)

• • •

§ 1092. **(9281) Maintaining nuisance; definition of.**–Any person who shall use, occupy, establish, or conduct a nuisance as defined in the preceding section, or aid or abet therein, and the owner, agent or lessee of any interest in any such nuisance, together with the person employed or in control of any such nuisance by any such owner, agent or lessee, all for the purpose of this article, be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided. (1919, p. 52.)

§ 1093. **(9282) Injunction of nuisance.**–Whenever a nuisance exists, the attorney-general of the state, or the solicitor, his assistant or deputy, or any prosecuting attorney in the county, or any citizen or citizens, may bring an action in equity in the name of the state of Alabama, upon the relation of such attorney-general, or such other officer or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof. (1919, p. 52.)

• • •

§ 1094. **(9283) When injunction issued before hearing.**–No injunction or restraing order shall be issued before hearing in any action brought by a citizen or citizens under the provisions of this article, unless such citizen or citizens have made bond in such sum as may be fixed by the judge to whom the application for such injunction or restraining order is made, such bond to be approved by the register of the circuit court of the county in which the proceeding is filed and to be payable and conditioned as provided by section 1043 of this title. (1919, p. 52.)

§ 1095. **(9284) Complaint, filing of; temporary injunction.**–Such action shall be brought in the circuit court of the county in which the property is located. At or before the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the probate judge of the county, together with a notice of

the pendency of the action, containing the name of the court, the names of the parties, the object of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. The probate judge shall be paid the usual fee for recording such lis pendens, who shall immediately record such notice. After the filing of the complaint, application for a temporary injunction may be made to the circuit court or a judge thereof or any judge authorized by the laws of the state to make an order for a preliminary injunction, who shall grant a hearing thereon within ten days thereafter. (1919, p. 52.)

* * *

§ 1096. **(9285) Restraining order, inventory of property.**—Where such application for a temporary injunction has been made, the court or judge thereof may, on the application of the complainant, issue an ex parte restraining order, restraining the respondents and all other persons from the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at, or upon one or more of the principal doors or entrances to such places, or the judge may order it served on the parties defendant. The officer serving such restraining order shall forthwith make and return into the court, an inventory of the personal property and contents situated in and used in conducting and maintaining such nuisance. (1919, p. 52.)

§ 1097. **(9286) Contempt of court, what constitutes.**—Any violation of such restraining order shall be a contempt of court, and where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court. (1919, p. 52.)

§ 1098. **(9287) Service of complaint, when writ granted.**—A copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction shall be served upon the respondents at least five days before such hearing. If the hearing be then continued at the instance of any respondent, the temporary writ as prayed shall be granted as a matter of course. (1919, p. 52.)

§ 1099. **(9288) Answer of respondents.**—Each respondent so notified shall serve upon the complainant or the attorney filing the bill, a verified answer on or before the date fixed in said notice for said hearing and such answer shall be filed with the register of the court wherein such cause is triable, but the court or judge may allow additional time for answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. (1919, p. 52.)

§ 1100. **(9289) Final decree, when granted.**—If upon the final hearing, the allegations be sustained to the satisfaction of the court or judge, the court or judge shall make a decreee restraining the respondents and all other person or persons from continuing the nuisance. When any injunction has been granted, it shall be binding on the respondents throughout the county. Any violation thereof shall be contempt of court and punished as hereinafter provided. (1919, p. 52.)

§ 1101. **(9290) Closing of premises, pending final decision.**—If on the hearing for a temporary injunction, it shall further appear that the person owning, in control, or in charge of the nuisance so enjoined has received five days' notice of the hearing, and unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, the court or judge shall issue an order closing the place against its use for any purpose until final decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or if not issued, shall include such an order restraining, for such period the removal or interference with the personal

property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. (1919, p. 52.)

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§ 1103. **(9292) Trial of action; evidence; judgment.**—The action when brought shall have precedence over all other cases except injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilty of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiescence and participation therein, on the part of the person or persons charged with maintaining such nuisance as herein defined. If the complaint is filed for the state by a citizen of the county, it shall not be dismissed except upon a sworn statement of the complainant or his personal representative or agent, and his attorney or of the officer filing the complaint, setting forth the reasons why the action should be dismissed and the dismissal be approved by the attorney filing the bill in writing or in open court. If the court or judge is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute such action to judgment at the expense of the county, and if the action is continued more than once, any person who is a citizen of the county, or the attorney-general or the solicitor may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed against such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the respondents and any other person or persons from further maintaining the nuisance at

the place complained of and the respondents from maintaining such nuisance elsewhere in the county. (1919, p. 52.)

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§ 1107. **(9296) Nuisance established in criminal action; proceedings under this article.**—In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against the defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement including the complainant's costs, or so much of such proceeds as may be necessary, except as hereinafter provided. (1919, p. 52.)

§ 1108. **(9297) Contempt proceedings or violation of closing order.**—In case of the violation of any injunction or closing order granted under the provisions of this article, or of any restraining order or the commission of any contempt of court in proceedings under this article, the court, or the judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the register of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested; he may be released on bond, pending the hearing, to be fixed by the judge. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses. A party found guilty of contempt, under the provisions of this article, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, or by imprisonment in

the county jail not less than one nor more than three months, or by both such fine and imprisonment. (1919, p. 52.)

APPENDIX "D"

CIRCUIT COURT, TENTH JUDICIAL
CIRCUIT OF ALABAMA
EQUITY DIVISION

STATE OF ALABAMA, ETC.
Complainant

v.

MTM, INC., a corp., et al
Respondents

CASE NO. 177-199

ORDER UPON PRAYER FOR TEMPORARY INJUNCTION

This cause came on to be heard and was submitted upon prayer for a temporary injunction addressed to Respondents as set forth in the Bill of Complaint. The allegations upon which the prayers for relief are based are lengthy and diverse but the apparent purpose thereof is to establish the perpetration of a nuisance by Respondents in their operation of a motion picture theatre and bookstore wherein allegedly lewd and obscene motion pictures and printed publications are offered, by advertisement, to the general public or a portion thereof. The temporary relief sought is (1) the enjoining of Respondents from further maintenance of the said alleged nuisance, (2) The closing of the theatre and bookstore pendente lite, and (3) the enjoining of the removal from the said premises of any personal property therein, or the interference therewith.

The Court finds that, as alleged, there have been numerous and repeated past violations of the laws and statutes of the State of Alabama and the ordinances of the City of Birmingham, Alabama, which govern, control

and /or apply to the operation of the said motion picture theatre and bookstore, all in a manner such as to constitute a nuisance.

Accordingly, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court as follows:

ONE: Respondents, their servants, agents or employees, are each hereby, separately and severally and conjointly temporarily enjoined from further maintaining such nuisance and any further maintenance thereof or any violation of this Order shall constitute an open contempt of this Court and its solemn Order.

TWO: Said Respondents are further enjoined from removing from the premises of the Pussycat Adult Theatre and Bookstore any and all personal property therein, or the interference therewith.

THREE: The foregoing restraining orders shall continue in effect to abide the further orders and decrees of this Court.

DONE and ORDERED this the 29th day of May, 1973.

Circuit Judge in Equity Sitting

cc: Hon. Herbert Jenkins
Hon. Ferris Ritchey

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

AIRWAYS THEATER, INC. and
SOUTHLAND THEATRES, INC.,
Plaintiffs

v.

PHIL M. CANALE, District Attorney General; DAVID M. PACK, Attorney General of Tennessee; and WINFIELD DUNN, Governor of the State of Tennessee,

Defendants

CIVIL C-73-262

PER CURIAM

Before: FREDERICK PIERCE LIVELY, Circuit Judge; BAILEY BROWN, Chief District Judge and ROBERT M. McRAE, JR., District Judge.

Plaintiffs Airways Theater, Inc. and Southland Theatres, Inc., operators of "adult" motion picture theaters in Memphis, Tennessee, challenge the constitutionality of Tennessee's obscenity statute, T.C.A. § 39-3003 through 3008, and Tennessee's nuisance statute, T.C.A. § 23-301 et seq. Plaintiffs seek both declaratory and injunctive relief. Jurisdiction is based on 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. § 2201. Since plaintiffs seek to enjoin state officers from enforcing allegedly unconstitutional statutes, a three-judge court has been convened. 28 U.S.C. § 2281.

Plaintiffs contend that the statutory definition of obscenity in § 39-3007 is vague and overbroad in the light of the requirement in *Miller v. California*, _____ U.S._____, 37 L.Ed. 2d 419 (1973), that the sexual conduct prohibited must be specifically defined. Plaintiffs also challenge the procedures established by the obscenity statute for obtaining temporary restraining orders or injunctions, contending that, properly construed, they allow such to be issued without a prior adversary hearing. The nuisance statute is challenged on the grounds that it is vague and overbroad and that it operates as a prior restraint without procedural safeguards.

Defendants rely on the threshold defenses that plaintiffs have not stated an actual controversy, that, as to plaintiff Southland, the existence of a criminal proceeding against it under the obscenity statute prevents the granting of any relief to it with respect to that statute, and that this Court should, applying the abstention doctrine, deny all relief to plaintiffs. Defendants further contend that in any event, properly construed, the involved statutes are constitutional.

We conclude that plaintiffs have stated an actual controversy, but that the existence of a criminal proceeding against plaintiff Southland, together with a proper application of the abstention doctrine, preclude this Court from granting either declaratory or injunctive relief as to the obscenity statute. We do, however, hold that Tennessee's nuisance statute is unconstitutional.

JUSTICIABILITY

We conclude that the facts alleged indicate that there is "a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality . . . ." *Golden v. Zwickler*, 394 U.S. 103 (1969). It is without question that there is an actual controversy as to plaintiff Southland involving the obscenity statute since subsequent to the filing

of this action, Southland was indicted in state court under that statute.[1]

Plaintiffs' other allegations also lead to the conclusion, although it is not without doubt, that there is an actual controversy as to plaintiff Southland involving the nuisance statute and as to plaintiff Airways involving both statutes in question. Plaintiffs have alleged that they are operators of "adult" motion picture theaters and that they have been exhibiting adult motion pictures and desire to continue doing so in a lawful manner. Tennessee's obscenity and nuisance[2] statutes are directed in part at such establishments. It is without dispute that defendant District Attorney General Canale made statements in the Memphis newspapers shortly before this action was filed which indicate that he intends to enforce the statutes in question. In addition, representatives of defendant Canale have at his direction recently attended movies at the Airways Theater. Since plaintiff Southland has been enjoined under this obscenity statute prior to the filing of this action, and subsequent to such filing has been indicted, it is reasonable to conclude in the light of defendant Canale's statements and his representatives' actions that both plaintiffs have "assert[ed] a sufficiently direct threat of personal detriment," *Doe v. Bolton*, 410 U.S. 179 (1973), both as to the obscenity statute and the nuisance statute.

YOUNGER v. HARRIS

Prior to the filing of this action, as indicated, two injunctions had been issued against plaintiff Southland in the

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[1] Moreover, prior to the filing of this action, two injunctions had been issued against Southland in state Criminal Court pursuant to the obscenity statute.

[2] The nuisance statute was only recently amended to include lewdness and obscene or pornographic material.

Criminal Court of Shelby County, Tennessee pursuant to T.C.A. § 39-3003. Plaintiff Southland contends, however, that since these injunctions are civil in nature, *Younger v. Harris*, 401 U.S. 37 (1971) does not require that we dismiss this action. We need not reach the question of whether *Younger* proscribes interference in pending state civil actions, for after examining T.C.A. § 39-3003, pursuant to which the injunctions were issued, we conclude that the issuance of injunctions under that section is a first step in a process which looks toward the submission of an indictment to the grand jury, and thus § 39-3003[3] (including that part authorizing the issuance of injunctions) should be regarded as part of a criminal process.

Thus, there having been no allegations by Southland of harassment or bad faith prosecution, *Younger, supra*, requires that this Court not grant that plaintiff injunctive relief as to the obscenity statute and *Samuels v. Mackell*, 401 U.S. 66 (1971) likewise precludes declaratory relief.

ABSTENTION

The Supreme Court of Tennessee, as a result of the remand to it of cases by the Supreme Court of the United States, is presently considering the constitutionality of the Tennessee obscenity statute in the light of *Miller v. California*, ___ U.S. ___, 37 L.Ed. 2d 419 (1973). Although the

[3] §39-3005 also provides for injunctions, but looks not toward ultimate submission to the grand jury; rather, upon the obtaining of a permanent injunction, it looks to the seizure and destruction of obscene material.

Tennessee statute does not describe specific prohibited sexual conduct,[4] it is possible that the Tennessee Supreme Court might give it such a limiting construction, *e.g.*, as the Supreme Court of the United States construed a federal obscenity statute in *United States v. 12 200-Ft. Reels*, ___ U.S. ___, 37 L.Ed. 2d 500 n. 7 (1973). Similarly the question whether the obscenity statute, insofar as it establishes injunction procedures, can be constitutionally construed is also before the Tennessee Supreme Court. Thus, the doctrine of abstention requires that this Court refrain from granting either plaintiff injunctive or declaratory relief regarding the obscenity statute. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

CONSTITUIONALITY OF THE NUISANCE STATUTE

Since thery is no *Younger v. Harris* or abstention problem as to either plaintiff regarding the nuisance statute,[5] we now consider the constitutionality of that statute. We conclude that the statute is unconstitutional for at least two reasons. In the first place, among the definitions of nuisance in the statute is "any place in or upon which . . . possession of any material determined to be obscene or pornographic . . . [is] carried on or permitted . . . " "Place" is defined in the statute as "any building, room, enclosure or vehicle, or separate part or portion thereof or the ground itself." Thus, possession in one's home of material determined to be obscene or pornographic would clearly make that home a nuisance subject to abatement. Under *Stanley v. Georgia*, 394 U.S. 557

[4] The Tennessee obscenity statute (§39-3007) tracks the language of the Supreme Court in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

[5] It is not contended that there are any pending state actions against either plaintiff under the nuisance statute or that the constitutionality of that statute is challenged in any state court. Moreover, as will be seen, the statute is not subject to an interpretation that would allow it to pass constitutional muster.

(1969), the state's power to regulate obscenity "does not extend to mere possession by the individual in the privacy of his own home." 394 U.S. at 568.

Secondly, the nuisance statute also provides that "[a]ll furnishings, fixtures, equipment and stock, used in or in connection with the maintaining or conducting of a nuisance shall be subject to seizure, immediately upon detection by any law enforcement officer . . . ." Thus, once there is a determination of obscenity by a law enforcement officer, the seizure of the property may take place. In *Roaden v. Kentucky*, ___ U.S. ___, 37 L.Ed. 2d 757 (1973), the Supreme Court overturned a seizure of a film which "proceeded solely on a police officer's conclusions that the film was obscene." A magistrate had not been afforded an opportunity to "focus searchingly on the question of obscenity." 37 L.Ed. 2d 765-66. The Tennessee nuisance statute permits not only seizure of the film or other obscene material, conduct that was proscribed in *Roaden*, but also seizure of furnishings, fixtures and equipment used in connection therewith merely upon determination of obscenity by a law enforcement officer.

It results that plaintiffs' claim with respect to the unconstitutionality of the obscenity statute should be dismissed without prejudice. With respect to the nuisance statute, plaintiffs are entitled to a declaration of unconstitutionality; however, they are not entitled to an injunction against enforcement of such nuisance statute since they have not shown irreparable injury. *Zwickler v. Koota*, 389 U.S. 241 (1967).

Since the judgment to be entered will be somewhat unusual as to its content, it is requested that the parties prepare and submit such to this Court.

ENTER this 19th day of November, 1973.

Pierce Lively, Circuit Judge

Bailey Brown, Chief District Judge

Robert M. McRae, Jr., District Judge